

## Department of Labor and Industry sets five-year goals, strategies

The Minnesota Department of Labor and Industry (DLI) has conducted a review of its priorities and operations and prepared a strategic plan to guide it in carrying out its mission during the next five years.

DLI administers seven specific program areas:

- Apprenticeship
- Construction Codes and Licensing
- General Support
- Labor Standards
- Occupational Safety and Health (Minnesota OSHA)
- Workers' Compensation
- Office of Combative Sports

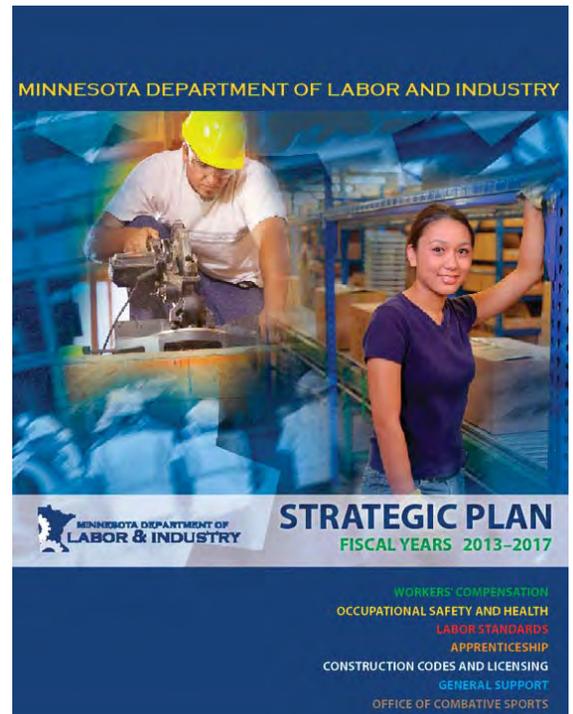
The strategic plan does not describe all of the agency's functions. Instead, it identifies areas where DLI staff members and stakeholders believe focus and innovation can improve the services provided by the agency.

Mindful of the need to use its resources wisely, DLI first identified the core objective of each of its units, requiring an answer to the basic question "Why is DLI's work important to the citizens of the state of Minnesota?" It then identified specific, targeted strategies to carry out each of the objectives. Finally, outcome measurements were established to determine whether DLI is successful in the strategies and initiatives it undertakes.

As part of its strategic planning process, DLI took a close look at the work it performs and considered how to measure the results of its efforts. In addition, areas were identified where DLI didn't currently collect the data necessary to measure success. In those situations, DLI will identify and monitor available information so appropriate baselines can be established.

The Department of Labor and Industry is committed to fair and firm enforcement of the laws it administers and to being a responsive and reliable resource for its stakeholders, including employers, workers, insurers and licensees.

The strategic plan will help DLI continue to improve the services it provides. It is available on the DLI website at [www.dli.mn.gov/PDF/strategic\\_plan.pdf](http://www.dli.mn.gov/PDF/strategic_plan.pdf).



### DLI Dashboard shows agency performance indicators

The DLI Dashboard tracks the agency's progress in key areas. Stakeholders can see where the agency is on track and where it needs to improve.

View the dashboard online at [www.dli.mn.gov/Dashboard.asp](http://www.dli.mn.gov/Dashboard.asp).

## DLI reviews processes to cut waste, speed up response times

The Department of Labor and Industry (DLI) is reviewing and streamlining many of its processes in an effort to cut any possible waste and speed-up response times throughout the agency.

Internally, the department solicited ideas and suggestions for continuous improvement initiatives and assembled a Continuous Improvement Team. For each initiative, a committee of DLI employees takes part in meetings to explore the entire process, look for ways to eliminate or combine steps along the way and form an action plan for efficient implementation of the changes.

In 2012, groups worked on improving internal processes, such as department purchasing, employee

expense reimbursement, and the receipt, processing and delivery of mail. External processes reviewed included personal licensing by the Construction Code and Licensing Division (CCLD), Special Compensation

Fund investigations, and Alternative Dispute Resolution certification of disputes, medical requests and rehabilitation requests.

Processes being studied in 2013 include more of the department's internal processes, as well as external processes such as: penalties and back wage payments to Labor Standards, apprenticeship registration and completion, obtaining and tracking judgments, education of the CCLD staff members, qualified rehabilitation consultant registration, and the review and approval of Minnesota OSHA safety grant applications.



### Mileage rate rises

A new, higher mileage rate became effective in Minnesota on Jan. 1. The rate changed from 55.5 cents a mile to 56.5 cents a mile.

## Save the date: 2013 Workers' Compensation Summit

### Workers' Compensation Summit moves to metro, one-day schedule set for Sept. 12

The Minnesota Department of Labor and Industry will host its 2013 Workers' Compensation Summit on Thursday, Sept. 12, at the Crowne Plaza Hotel in St. Paul, Minn.

The one-day conference will feature multiple breakout sessions led by experts and stakeholders in workers' compensation and occupational safety and health.

The conference will examine current issues that affect employers, employees, insurers, medical providers, legislators, attorneys and others who comprise Minnesota's workers' compensation system.

Watch for more information soon!

# Information sheet: What injured workers should know about lumbar fusion surgery as a treatment for degenerative disc disease

*This information is for injured workers with a Minnesota workers' compensation claim who are considering lumbar fusion surgery. It does not provide medical advice. Whether lumbar fusion is right for an injured worker is a choice the injured worker must make with his or her doctor.*

## What is lumbar fusion surgery?

Lumbar fusion surgery is performed as treatment for a number of different conditions that affect the structural integrity of the spine (for example, certain spinal fractures). Lumbar fusion surgery is also sometimes performed for treatment of severe chronic low back pain in patients with degeneration of one or more lumbar discs.

## What are the results of lumbar fusion for injured workers with chronic low back pain and degenerative disc disease?

An injured worker might want to consider and discuss the following information<sup>1</sup> with his or her physician before making a decision about whether to proceed with surgery.

- Studies of injured workers show about half of them get better after the surgery. However, up to one-third of patients report a "poor" result.
- In some studies, when lumbar fusion is compared to other treatments, patients who receive a fusion do better than those who just continue to get the same treatment they were already receiving. However, in other studies, patients who were referred for intensive medical management and interdisciplinary rehabilitation did as well as those who had fusion surgery.
- Ten to 20 percent of patients develop complications from the surgery. Complications include infection, deep vein thrombosis, pulmonary embolism, nerve injuries and problems with bone grafts or implanted devices.
- About one in every four injured workers who have a lumbar fusion will have another lumbar surgery. Subsequent surgeries are often done because the fusion doesn't "take" (become solid) or the hardware used in the fusion becomes a problem; or, because the spine above or below the fusion starts to deteriorate, causing more pain and disability.
- Most injured workers who are disabled by their back pain remain disabled after their fusion surgery, with fewer than 50 percent returning to work.
- Most injured workers continue to use strong pain medication after their surgery; some even require more medication.

## Can I get a second opinion?

The workers' compensation law allows injured workers to get a second opinion from a provider of their choice, paid for by the workers' compensation insurer.

## What does workers' compensation law allow?

Lumbar fusion surgery is allowed by Minnesota's workers' compensation treatment rules for patients with incapacitating low back pain that has persisted for more than three months and who have



degenerative disc disease and positive discogram at one or two spinal levels. These rules require that the injured worker's surgeon notify the workers' compensation insurer of a proposed lumbar fusion surgery at least seven days before surgery, except in cases of emergency. Within seven working days after receiving notice from the injured worker's surgeon the insurer must either: 1) approve or deny the surgery; 2) request additional information from the doctor; 3) request the injured worker get a second opinion; or 4) arrange an examination by a doctor of the insurer's choice.

### What do medical organizations say about lumbar fusion?

Several medical societies have done thorough reviews of the scientific studies on lumbar fusion.<sup>2</sup>

- The American Pain Society in 2009 recommended that "*... shared decision-making regarding surgery for nonspecific low back pain include a specific discussion about intensive interdisciplinary rehabilitation as a similarly effective option, the small to moderate average benefit from*



*surgery versus non-interdisciplinary nonsurgical therapy, and the fact that the majority of such patients who undergo surgery do not experience an optimal outcome (defined as minimum or no pain, discontinuation of or occasional pain medication use, and return of high-level function)."*

- The International Society for the Advancement of Spine Surgery in 2007 recommended that fusion surgery is only indicated for patients with chronic low back pain and degenerative disc disease if: "*... The patient has not shown sufficient improvement from a minimum of 6 consecutive months of structured conservative medical management (including at least pain medication, activity modification, and daily exercise), with adequate patient compliance.*" And, "*The patient has then subsequently not shown sufficient improvement from a program of intensive multidisciplinary rehabilitation ...*"
- The American Association of Neurological Surgeons in 2005 concluded that "*Lumbar fusion is recommended as a treatment for carefully selected patients with disabling low back pain due to one- or two-level degenerative disease without stenosis or spondylolisthesis ... An intensive course of physical therapy and cognitive therapy is recommended as a treatment option for patients with low-back pain in whom conventional medical management has failed.*"

### What treatment is available if the injured worker decides not to have lumbar fusion?

Minnesota's workers' compensation treatment rules allow for a variety of treatment options including: intensive physical rehabilitation, chronic pain management, ongoing medication, work conditioning/work hardening programs and health club memberships. The injured worker and his or her doctor should discuss whether any of these or other treatment options would be helpful.

<sup>1</sup>Franklin GM, et al "Outcome of lumbar fusion surgery in Washington state workers' compensation" Spine 1994; 19(17): 1897-903  
DeBerard MS, et al "Outcomes of posterolateral fusion in Utah patients receiving workers' compensation" Spine 2001; 26(7): 738-46  
Hodges SD, et al "Predicting factors of successful recovery from lumbar spine surgery among workers' compensation patients" J Am Osteopath Assoc 2001; 101(2): 78-83

Maghout-Juratli S, et al "Lumbar fusion outcomes in Washington State" Spine 2006; 31: 2715-2723

Nguyen TH, et al "Long-term outcomes of lumbar fusion among workers' compensation subjects" Spine 2011; 36(4):320-331

<sup>2</sup>Chou R, et al "Interventional Therapies, Surgery, and Interdisciplinary Rehabilitation for Low Back Pain. An Evidence-Based Clinical Practice Guideline From the American Pain Society" Spine 2009; 34:1066-1077

International Society for the Advancement of Spine Surgery Policy Statement on Lumbar Spinal Fusion Surgery [www.isass.org/public\\_policy/2011-07-15\\_policy\\_statement\\_lumbar\\_surgery.html](http://www.isass.org/public_policy/2011-07-15_policy_statement_lumbar_surgery.html)

Resnick DK, et al "Guidelines for the performance of fusion procedures for degenerative disease of the lumbar spine. Part 7: intractable low-back pain without stenosis or spondylolisthesis" J Neurosurg: Spine 2005; 2:670-672

## Department revises FROI form, EDI implementation guide

### Revised First Report of Injury (FROI) form now available

To prepare for the Jan. 1, 2014, anticipated implementation date, the Department of Labor and Industry (DLI) has made changes to the First Report of Injury (FROI) form. The specific changes were detailed in the department's Nov. 1, 2012, notification to stakeholders and published in the November edition of *COMPACT*. The revised FROI form is now available for use and may be found on the department's website at [www.dli.mn.gov/WC/Wcforms.asp](http://www.dli.mn.gov/WC/Wcforms.asp).

The instructions for completing the FROI form have been updated to reflect the changes made to the various fields. While there is no penalty associated with failure to use the new form, transition to use of the new form as soon as possible is recommended.

### Revised implementation guide now available

As part of DLI's efforts in transitioning to mandatory electronic filing of FROI forms, the existing state of Minnesota EDI implementation guide has also been revised, including the necessary tables and worksheets. This version will be used when testing begins with all trading partners. Current trading partners will receive a separate email message regarding the testing process. The revised implementation guide may be found on the department's website at [www.dli.mn.gov/WC/Edi.asp](http://www.dli.mn.gov/WC/Edi.asp).



### Tentative timetable for Jan. 1, 2014, EDI/eFROI implementation

- March 1, 2013 Begin testing EDI requirement changes specified in the implementation guide with current trading partners
- May 1, 2013 Testing begins with new EDI trading partners on a voluntary basis, using the standards outlined in the revised implementation guide
- July 1, 2013 Testing of the eFROI Web portal, via the DLI website, begins on a voluntary basis
- Oct. 1, 2013 Cut-off date to begin testing for all eFROI and EDI trading partners
- Dec. 1, 2013 Completion date for testing of all eFROI and EDI trading partners
- Jan. 1, 2014 Electronic filing of FROI forms for reporting entities will be required

More information, including frequently asked questions, can be found on the department's website at [www.dli.mn.gov/WC/Edi.asp](http://www.dli.mn.gov/WC/Edi.asp).

Any questions, comments or concerns regarding implementation can be directed to the EDI/eFROI Implementation Team at [dli.edi@state.mn.us](mailto:dli.edi@state.mn.us).

## **REQUEST FOR COMMENTS:**

### **Possible amendments to rules governing workers' compensation treatment parameters rules related to spinal cord stimulators and intrathecal drug delivery systems, Minnesota Rules, 5221.6200; 5221.6205; 5221.6210; and 5221.6305**

**Subject of rules** – The Minnesota Department of Labor and Industry requests comments on its possible amendment to the workers' compensation treatment parameter rules. The department is considering rule amendments that will describe indications for the use of spinal cord stimulators and intrathecal drug delivery systems to treat intractable pain due to workers' compensation injuries to the neck, low back or thoracic back, or due to complex regional pain syndrome caused by a work injury.

**Persons affected** – The amendments to the rules would likely affect injured workers with intractable pain and health care providers who treat patients with workers' compensation injuries, especially those who use or recommend spinal cord stimulators and intrathecal drug delivery systems. The amendments would also affect workers' compensation insurers, self-insured employers and other workers' compensation payers, and certified managed care plans.

**Statutory authority** – Minnesota Statutes § 176.83, subd. 5, authorizes the department to adopt by rule standards for health care provider treatment to injured workers, including criteria for treatment of chronic pain and surgical procedures. The rules are to be used to determine whether treatment provided to injured workers is excessive, unnecessary or inappropriate based upon accepted medical standards.

**Public comment** – Interested persons or groups may submit comments or information on these possible rules in writing until further notice is published in the *State Register* that the department intends to adopt or to withdraw the rules. The department will not publish a notice of intent to adopt the rules until more than 60 days have elapsed from the date this Request for Comments is published in the *State Register*. The department does not plan to appoint an advisory committee to comment on the possible rules, but comment has been sought from the workers' compensation Medical Services Review Board. The Workers' Compensation Advisory Council and the Workers' Compensation Insurers' Task Force will also have the opportunity to comment on the possible rules. Affected persons are encouraged to comment on the possible rules, including the probable costs of complying with the rules; the probable costs of not adopting the rules; the cumulative effect of the rules with other state and federal regulations related to the specific purpose of the rules; and whether there are less costly, less intrusive or alternative methods for achieving the purpose of the rules.

**Rule drafts** – A draft of the possible rule amendments is available on the Department of Labor and Industry rule docket page at [www.dli.mn.gov/PDF/docket/5221\\_6020\\_8900TrtmPar\\_3.pdf](http://www.dli.mn.gov/PDF/docket/5221_6020_8900TrtmPar_3.pdf).

**Agency contact person** – Written comments, questions and requests for more information on these possible rules should be directed to: Kelli Peters at the Department of Labor and Industry, 443 Lafayette Road N., St. Paul, MN 55155, (651) 284-5006, [dli.rules@state.mn.us](mailto:dli.rules@state.mn.us). TTY users may call the department at (651) 297-4198.

**Alternative format** – Upon request this information can be made available in an alternative format, such as large print, Braille or audio. To make such a request, contact the agency contact person at the address or telephone number listed above.

**Note:** This notice replaces any previous Request for Comments about amendments to the treatment parameter rules. Comments received in response to this notice or previous notices will not necessarily be included in the rulemaking record submitted to the administrative law judge if and when further proceedings to adopt these rule amendments are started. The agency is required to submit to the judge only those written comments received in response to the rules after they are proposed. If you submitted comments during the development of the rules and you want to ensure that the administrative law judge reviews the comments, you should resubmit them after the rules are formally proposed.

# Professional conduct complaints: rehabilitation providers

By Mike Hill, Rehabilitation Policy Specialist



Rehabilitation is intended to restore an injured employee to a job related to their former employment or to a job in another work area that produces an economic status as close as possible to that which they would have enjoyed without disability. The Minnesota Department of Labor and Industry (DLI) has established rules that govern the delivery of services within the workers' compensation system.

If a party believes a rehabilitation provider is not following the statutes or rules, a written complaint may be filed with the department.

Upon receipt, DLI investigates to determine if a violation has occurred and if disciplinary action is warranted. Table 1, below, details closed complaint files and where the complaints originated.

**Table 1. Source initiating complaint, 2008 through 2012**

Year	ER/IR	Esq.	EE	Rehab.	DLI/internal	Other	Total
2008	14	8	3	4	30	1	60
2009	7	4	5	1	16	0	36
2010	8	0	4	2	2	0	16
2011	0	2	1	79	3	0	85
2012	5	3	3	18	27	0	56

## Complaint outcomes

A single complaint may allege violations of several workers' compensation statutes or rules. During the course of an investigation, additional issues may be identified. The most serious outcomes are recorded in the complaint file.

Outcomes are determined by the findings of the investigation. Possible outcomes include the following.

- **Unsubstantiated** – The complaint may be dismissed if the department lacks jurisdiction, the complainant fails to provide necessary information or the allegations are not supported by the information obtained.
- **Letter of instruction** – If the investigation reveals the subject did not act optimally, the alleged conduct is identified. A letter of instruction is then developed and placed as a private document in the provider's file. While the letter is not considered to be formal discipline, the information is retained by the department for retrieval if any subsequent inquiry into a provider's conduct is undertaken.
- **Discipline/stipulation** – If the result of an investigation supports the allegation, then formal disciplinary action may be warranted. Discipline, in the form of a stipulated agreement, involves corrective action and a fine. The severity of the disciplinary action may be increased if the subject has a history of similar violations, if violations have caused harm or if the subject has demonstrated a pattern of noncompliance with workers' compensation statutes and rules.
- **No appeal** – The contested court hearing decision is not appealed.

- **Inactive rehabilitation provider** – During the investigation the rehabilitation provider made their registration inactive. Prior to re-registration with DLI, the rehabilitation provider complaint must be dealt with first.

Table 2 identifies investigation outcomes by subject type.

**Table 2. Professional conduct and accountability outcomes, 2008 through 2012**

Year	No juris.	Unsub.	Ltr. of inst.	Stip./fine	No appeal	Inactive	Total files
2008	0	24	16	21	0	0	61
2009	3	11	15*	8*	0	0	36
2010	1	4	5	6	0	0	16
2011	0	6	3**	2**	0	0	10
2012	0	13	23***	4***	3	6	47

\*One of the provider complaints resulted in a letter of instruction and a stipulation.

\*\*One of the provider complaints resulted in a letter of instruction and a stipulation.

\*\*\*Two of the provider complaints resulted in a letter of instruction and a stipulation.

### Some 2012 rule violations

- Contacting physician without written medical release..... 5220.1802, subp. 5
- Delay of reporting pertinent information ..... 5220.1801, subp. 9 K (2)
- Assisting claims with setting file reserves.....5220.1801, subp. 8 B (3)
- Recommending medical treatment authorization through use of ODG, MDA guidelines, etc.....5220.1801, subp. 8 B (4)
- Failure to place QRC number on all reports ..... 5220.1803, subp. 5
- Inadequate disclosure of QRC firm ownership interest, business referral relationship, etc. to the parties .....5220.1803, subp. 1a
- Represented self as a QRC while working as disability case manager..... 5220.1805 B
- Informed employee there was no difference in roles while working as a disability case manager and then as the QRC..... 5220.1801, subp. 9 F
- Not providing copies of all required reports, progress records to clients, all parties ..... 5220.1802, subp. 3  
..... 5220.0100, subp. 30  
..... 5220.0100, subp. 31
- All required reports and required progress records are to have the employee’s name, WID number or SSN, and DOI listed..... 5220.1802, subp. 1
- Failure to file narrative report with the rehabilitation consultation report form ..... 5220.0130, subp. 3C(4)
- Not keeping all required reports and progress records, including handwritten notes, case notes, email, etc., up to five years after the rehabilitation file is closed..... 5220.1803, subp. 5
- QRC intern supervisor not signing off on all written documentation.....5220.1400, subp. 3a
- R-2 initial evaluation reports missing required information ..... 5220.1803, subp. 5
- Not attending mandatory rehab. provider update training .....5220.1500, subp. 3a
- Arranging FCE for insurer, which the treating physician was against.....5220.1801, subp. 8 B(7)
- QRC allowed out of state vendor/case manager to violate Minnesota rules while serving injured worker..... 5220.1801, subp. 9 E
- Not listing service codes, service descriptions, time units, etc. on invoices..... 5220.1900, subp. 1a (A-D)

The text of the rules violated may be reviewed in the Minnesota Administrative Rules via the Office of the Revisor of Statutes website at [www.revisor.mn.gov/rules/?id=5220](http://www.revisor.mn.gov/rules/?id=5220).

## Conclusion

The purpose of a professional conduct investigation is to determine if a violation of the rules and statutes has occurred and then to correct the behavior to prevent future problems. Through outreach, education and compliance efforts, the department strives to work with rehabilitation providers to improve the quality of services provided to the stakeholders in Minnesota.

The Department of Labor and Industry website includes resources to help rehabilitation providers to enhance their work, at [www.dli.mn.gov/WC/RehabProv.asp](http://www.dli.mn.gov/WC/RehabProv.asp). Additionally, stakeholders with questions or concerns may call DLI staff members at (651) 284-5005 or 1-800-342-5354.

## Vocational Rehabilitation unit helps injured workers get back to work

The Department of Labor and Industry's Vocational Rehabilitation unit (VRU) provides vocational rehabilitation services to injured workers whose claims have been denied by the employer/insurer. These services are provided or coordinated by vocational rehabilitation counselors who are registered as qualified rehabilitation consultants (QRCs). The QRCs are professionals who have knowledge of medical factors, local labor markets and statutes concerning rehabilitation within Minnesota's workers' compensation law.

- Erik had been unemployed for years when his VRU QRC was assigned to help. After two surgeries for a long-standing back injury, Erik's VRU QRC assisted in finding him full-time employment, within his physical abilities, working for a specialty manufacturer and earning \$18 an hour.
- Judy loved her custodial job, but developed significant arm problems at work. After Judy had surgery and was assigned permanent restrictions, her VRU QRC worked closely with her employer to develop a modified full-time custodial job where Judy earns more than \$17 an hour.
- Bill was employed in production and suffered a low back injury. Bill's employer did not have work available within his restrictions so Bill started a job search. His VRU QRC assisted him in finding a temporary, full-time position at \$12 an hour. The VRU QRC continued to provide support for Bill until he secured a permanent, full-time position in another production industry, within his restrictions. He now earns \$17 an hour, \$2 an hour more than his date-of-injury wage.
- Juan, a maintenance worker, was earning \$13 an hour when he suffered a low back injury. Following surgery, a VRU QRC worked proactively with Juan and the treating physician to facilitate physical therapy and then to identify permanent limitations for a safe return to suitable work. After a five-month job search with the support of his VRU QRC, Juan was hired to perform work for a new employer. He is now earning a slightly higher hourly wage.

More information about eligibility, how a request for consultation is made and the services offered by the Department of Labor and Industry VRU is available online at [www.dli.mn.gov/WC/Vru.asp](http://www.dli.mn.gov/WC/Vru.asp).



Vocational counseling



Medical management



Computer training



Return-to-work services

# 2012 updates to annual department reports released

## **Collection and Assessment of Fines and Penalties report**

Minnesota Statutes §176.222 directs the commissioner of the Department of Labor and Industry to submit an annual report regarding the assessment and collection of fines and penalties under the workers' compensation law. Some of the results of the current report include the following findings.



FISCAL-YEAR 2012

### **COLLECTION AND ASSESSMENT OF FINES AND PENALTIES**

IN THE WORKERS' COMPENSATION SYSTEM

The department has continued to improve its efforts to find employers that have never obtained or fail to maintain workers' compensation coverage. During the past year, DLI has made efforts to proactively contact new employers to provide them with information regarding their potential obligation to carry workers' compensation

insurance, assist with a better understanding of their obligation and promote compliance with workers' compensation laws. In response to employers' requests, DLI is also revamping the penalty process to include correspondence that is more understandable to the employer.

Most claim-related penalties had been trending downward since fiscal-year 2007, paralleling the gradual decline in the number of lost-time claims and gradual increase in the timeliness of the insurer's first action (making the first payment of wage-loss benefits or denying liability) during the same time period. However, the numbers increased in fiscal-year 2012 due to the gradual increase in the number of lost-time claims that is beginning to occur and the slight decrease in the timeliness of the insurer's first action in the past couple of years.



FISCAL-YEAR 2012

### **PROMPT FIRST ACTION REPORT ON WORKERS' COMPENSATION CLAIMS**

IN THE WORKERS' COMPENSATION SYSTEM

## **Prompt First Action Report on Workers' Compensation Claims**

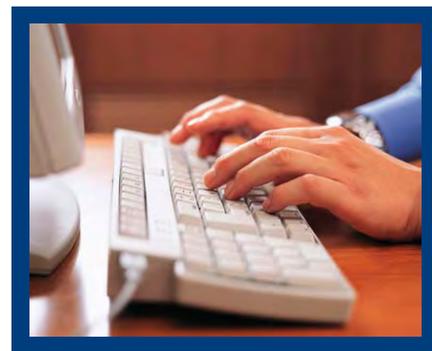
Minnesota Statutes §176.223 directs the DLI commissioner to publish an annual report providing data about the promptness of all insurers and self-insurers in making first payments or denials on a claim for injury.

The department evaluates data submitted on the *First Report of Injury* and *Notice of Insurer's Primary Liability Determination* forms to determine whether the first payment or denial of benefits is timely. In fiscal-year 2012, 89.4 percent of the 22,777 lost-time claims had a timely first action. This percentage decreased slightly from fiscal-year 2011, where 90.2 percent of the 23,184 lost-time claims had a timely first action.

The department's Workers' Compensation Division anticipates increased use of technology, electronic data interchange and early intervention will maintain or improve the overall first action timeliness percentage.

## **Access the reports**

Both reports are available on the Department of Labor and Industry website at [www.dli.mn.gov/WC/ReportsPubs.asp](http://www.dli.mn.gov/WC/ReportsPubs.asp).



## DLI-commissioned report recommends reimbursement cost controls

To compare Minnesota's workers' compensation reimbursement approach in the areas of hospital care, outpatient surgery, anesthesia and implants and to recommend ways to control costs in each of those areas, the Department of Labor and Industry (DLI) recently commissioned CGI Federal, Inc. to prepare the *Report on Workers' Compensation Reimbursement Methodologies*.

The report looked at the ways in which workers' compensation systems in other states (California, Florida, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, North Carolina, North Dakota, Tennessee, Washington, Wisconsin and Wyoming) and in certain federal programs (Medicare and Medicaid) reimburse providers of medical care and treatment.

### CGI recommendations

**Inpatient hospital reimbursement:** DLI should assess the implementation of the Medicare MS-DRG system.

**Outpatient hospital reimbursement:** Reimbursement should be under a predetermined payment system, such as the Medicare Ambulatory Patient Classification system or the Enhanced Ambulatory Patient Groups system.

**Small hospitals:** Small hospitals should be blended into any new inpatient or outpatient hospital reimbursement changes.

**Anesthesia:** A reimbursement system based on the Medicare RVU methodology should be implemented.

**Ambulatory surgical centers:** The Medicare ASC reimbursement methodology should be implemented.

**Surgical implants:** Reimbursement for surgical implants should be blended into any new prospectively based payment system because the cost of the item would be included in the surgical procedure. If a prospectively based payment system is not put into place, then reimbursement for surgical implants should be based on invoice cost.

The results of the study were presented by CGI to the Workers' Compensation Advisory Council at its December 2012 meeting. The report is available online at [www.dli.mn.gov/WC/Pdf/cgi\\_federal\\_report2012.pdf](http://www.dli.mn.gov/WC/Pdf/cgi_federal_report2012.pdf).



## How to report a workplace **accident** for workers' comp, OSHA

### Reporting for workers' compensation

Employers are required to report a workers' compensation claim to their insurer whenever anyone believes a work-related injury or illness that requires medical care or lost time from work has occurred. If the claimed injury wholly or partially incapacitates the employee for more than three calendar-days, the claim must be made on the First Report of Injury (FROI) form – [www.dli.mn.gov/WC/Wcforms.asp](http://www.dli.mn.gov/WC/Wcforms.asp) – and reported to the insurer within 10 days.

- **If the claim involves death or serious injury**, the employer must notify the Department of Labor and Industry (DLI) and their insurer within 48 hours of the occurrence. The claim may be reported to DLI by phone at (651) 284-5041, fax at (651) 284-5731 or personal notice. The initial notice must be followed by the filing of the FROI form within seven days of the occurrence.

### Reporting for OSHA

Employers are required by law to report occupational accidents – in which an employee is killed or three or more are hospitalized – to OSHA **within eight hours**.

- **During business hours** – 8 a.m. to 4:30 p.m., Monday through Friday – contact Minnesota OSHA Compliance by phone at (651) 284-5050 or 1-877-470-6742 or by email at [osha.compliance@state.mn.us](mailto:osha.compliance@state.mn.us).
- **After business hours** call the federal OSHA 24-hour toll-free phone number at 1-800-321-6742.

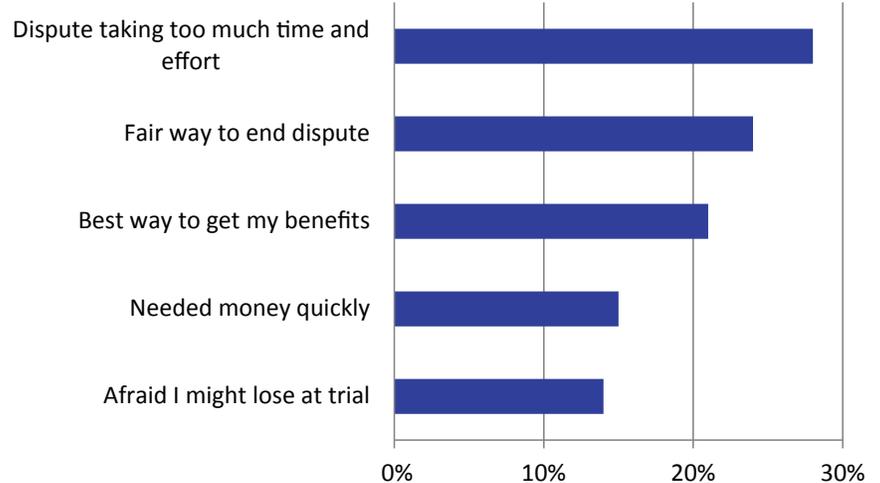
For more information about Minnesota OSHA, visit [www.dli.mn.gov/MnOsha.asp](http://www.dli.mn.gov/MnOsha.asp).

# Settlements, hearings survey report now available

By Brian Zaidman, Research and Statistics

During the spring of 2012, the Department of Labor and Industry (DLI) conducted a survey of workers with recent settlements or findings and orders from a hearing. The surveys asked questions about workers' decisions to go to trial or pursue a settlement, how well they understood their current or potential workers' compensation benefits, additional information they would like to have known and their comments about the dispute-resolution system. The report of the survey results is available on DLI's website at [www.dli.mn.gov/RS/WcSurvey.asp](http://www.dli.mn.gov/RS/WcSurvey.asp).

## Reasons given for settling claim



The figure above shows, for survey respondents with settlements, the percentage of times various reasons were selected for why the worker chose to settle their claim. Workers were allowed to select more than one reason and were also given the opportunity to write in additional reasons. See the full report for the reasons other survey respondents chose to go to a hearing and for analysis of the write-in responses.

The Department of Labor and Industry is using the survey results to consider actions to improve workers' experiences and outcomes as their claims disputes are processed and resolved.

## More resources from DLI: newsletters, specialty email lists

The Minnesota Department of Labor and Industry (DLI) offers three quarterly publications in addition to *COMPACT*: *Apprenticeship Works*, *CCLD Review* and *Safety Lines*.



- ***Apprenticeship Works*** is the newsletter from DLI's Apprenticeship unit. Its purpose is to inform the public of the purpose, plans and progress of the Apprenticeship unit. Learn more or subscribe at [www.dli.mn.gov/Appr/Works.asp](http://www.dli.mn.gov/Appr/Works.asp).
- ***CCLD Review*** is the newsletter from DLI's Construction Codes and Licensing Division. Its purpose is to promote safe, healthy work and living environments in Minnesota and to inform construction and code professionals about the purpose, plans and progress of the division. Learn more or subscribe on the DLI website at [www.dli.mn.gov/CCLD/Review.asp](http://www.dli.mn.gov/CCLD/Review.asp).
- ***Safety Lines***, from Minnesota OSHA, promotes occupational safety and health, and informs readers of the purpose, plans and progress of Minnesota OSHA. Learn more or subscribe to the quarterly newsletter on the DLI website at [www.dli.mn.gov/WC/SafetyLines.asp](http://www.dli.mn.gov/WC/SafetyLines.asp).

DLI also maintains five specialty email lists to which interested parties may subscribe: prevailing-wage information; workers' compensation adjuster information; workers' compensation EDI trading partners; workers' compensation medical providers information; and workers' compensation rehabilitation information.

Learn more about DLI's specialty email lists, subscribe or review previously sent messages at [www.dli.mn.gov/EmailLists.asp](http://www.dli.mn.gov/EmailLists.asp).

# Ask the ADR pro

## DLI's Alternative Dispute Resolution unit answers frequently asked questions

*Editor's note: The Alternative Dispute Resolution (ADR) unit at the Minnesota Department of Labor and Industry seeks early intervention in workers' compensation disputes through conference and mediation. It handles calls from the workers' compensation hotline and responds to questions from injured workers and their employers.*

**Q.** To prepare for a mediation session, what do the parties need?

**A.** Preparation for a mediation session can help ensure parties are ready to make the best effort possible to resolve a dispute.

A few steps of preparation can help avoid unnecessary delays and result in quicker resolutions. First, the parties should make sure any and all intervenors or potential intervenors are identified and the outstanding interests of these potential intervenors are identified. Next, the parties should make sure there is a general understanding of the realistic value of the claim from both parties' perspectives. Unrealistic expectations on either side of the claim will not make resolution of the claim likely.

Expectations can be more realistic and settlement at mediation can be more likely if parties attempt negotiations prior to the mediation. Finally, a willingness to see the potential claim from the other party's perspective will also be of benefit to an eventual agreement about the overall claim and make a satisfactory resolution more likely to happen.

**Q.** When is a claim "ripe" for mediation?

**A.** In reality, any time is a good time to use mediation services in most claims. Major or minor issues can readily be addressed by mediation.

In general, any time the parties can get together to discuss matters, it is ultimately going to be useful in getting a claim resolved down the road even if no specific issue is resolved on the date of the mediation session. In the earlier stages of a claim, mediation may be a significant cost-saving event if the matter can be resolved before a great deal of legal expense is incurred.



### Do you have a question for DLI's ADR unit?

Contact ADR at (651) 284-5005, 1-800-342-5354 or [dli.workcomp@state.mn.us](mailto:dli.workcomp@state.mn.us) if you have a question for DLI's ADR professionals. The question and answer may also be featured here at a later date.

## Duration of indemnity claims by industry

By Brian Zaidman, Research and Statistics

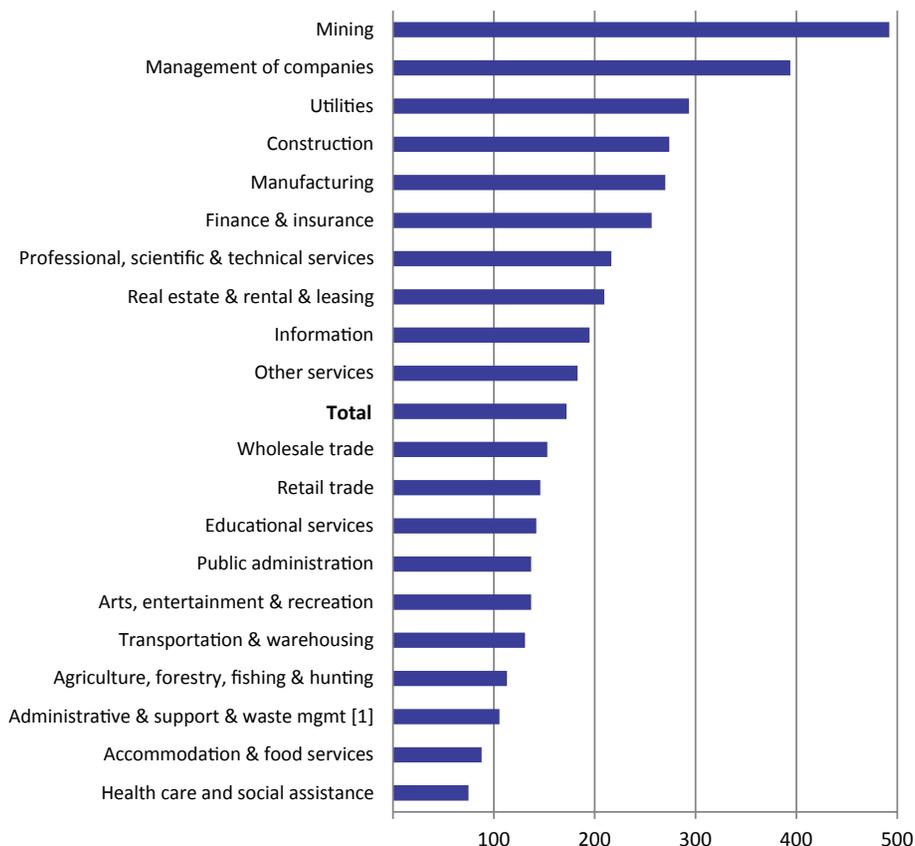
The time length of workers' compensation indemnity claims – the number of days from the date of injury until a closing document is filed – varies according to many factors. While the medical severity of the injury or illness is probably the most important factor affecting claim duration, many other factors are also important, including the worker's age, complicating health conditions, the type of work involved and claim disputes.

The figure below shows the median claim duration by industry for claims with injuries in 2003 and later and that closed in 2009, 2010 or 2011. A total of 68,800 claims were included. The median claim duration is the data point at which half of the workers have a lower value and half have a higher value. The number of claims by industry varied from 11,600 claims in health care and social services to 300 claims in mining and in management of companies.

The overall median claim duration was 172 days (5.7 months). The mean claim duration was 397 days (13.0 months). The mean value is affected by a relatively few claims with very long durations.

There is a wide variation in the median claim duration by industry, ranging from 492 days in mining to 75 days in health care and social services. Some industries where most of the workers have desk jobs, such as management of companies, and finance and insurance, are among those with a relatively long median claim duration. Some industries where most of the workers perform physical tasks, such as transportation and warehousing, and accommodation and food services, are among those with a relatively short median claim duration.

**Median duration of indemnity claims by industry group, claims closed in 2009-2011**



1. Administrative & support & waste management & remediation services

# Basic Adjuster Training 2013

**April 30 and May 1 • June 13 and 14 • Oct. 17 and 18**  
**8:30 a.m. to 4 p.m.**

**Recommended for claim adjusters who have less than one  
year of experience in Minnesota workers' compensation**

## Session topics

- Overview of Minnesota workers' compensation
- Rehabilitation benefits and issues
- Medical benefits and issues
- Waiting period
- Liability determination
- Indemnity benefits
- Penalties
- Dispute resolution
- How to file forms

## CEU credits

This educational offering is recognized by the Minnesota commissioner of commerce as satisfying 10.5 hours of credit toward continuing insurance education requirements.

## Location

Minnesota Department of Labor and Industry, 443 Lafayette Road N., St. Paul, MN 55155

## Cost

\$150 for the two-day session (includes lunch)

Early registration is encouraged. The session is limited to 28 people. Classes will be filled on a first-come, first-served basis. The Department of Labor and Industry reserves the right to cancel a session if there are not enough participants registered.

## Take the pre-test

Do you administer Minnesota workers' compensation claims? Not sure if you need training? Take the pre-test at [www.dli.mn.gov/WC/PDF/quiz.pdf](http://www.dli.mn.gov/WC/PDF/quiz.pdf) and see how you do.

*If you need special accommodations to enable you to participate or have questions about this training, call Jim Vogel at (651) 284-5265, toll-free at 1-800-342-5354 or TTY (651) 297-4198.*



# Workers' Compensation Court of Appeals

*October through December 2012*

Case summaries published are  
those prepared by the WCCA



***Parker vs. Teamvantage Molding, Inc., Oct. 1, 2012***

Causation – Substantial Evidence

Substantial evidence in the form of medical opinions with adequate foundation supports the compensation judge's determination that the employee developed occupational asthma as a result of a work-related exposure to chemicals.

Affirmed.

***Stevens vs. S.T. Servs, Oct. 8, 2012***

Permanent Total Disability – Discontinuance

Where it was apparently undisputed that the employee worked full time for three years while receiving permanent total disability benefits from the employer under a stipulation for settlement, but factual issues remained as to whether the employee was subsequently permanently and totally disabled again, given his age, condition, experience and the work available in his community, it was appropriate to refer the matter to the Office of Administrative Hearings for an evidentiary hearing and findings on that issue and the issue of the employer and insurer's entitlement to a credit.

Referred to Office of Administrative Hearings.

***Larrave vs. William Radzwill d/b/a Aggregate and Bulk Carriers, Oct. 9, 2012***

Practice and Procedure – Adequacy of Findings

The compensation judge's findings were sufficiently detailed and specific to disclose the basis for the judge's decision, permitting meaningful appellate review.

Evidence – Failure to Consider

A compensation judge need not relate or discuss every piece of evidence received at the hearing. Given the record and the compensation judge's findings, it is apparent the compensation judge reviewed and considered all the medical evidence submitted at the hearing.

Evidence – Expert Medical Opinion  
Causation – Substantial Evidence

An expert opinion does not lack foundation because the doctor fails to explain the mechanism of injury or the underlying reasons for the opinion. The employee's treating physicians, relied upon by the compensation judge, had adequate foundation for their opinions, and these opinions provide substantial evidence supporting the compensation judge's determination that the employee sustained injuries at work on Nov. 19 and 20, 2011, and that those injuries were substantial contributing causes of his left shoulder condition.

Affirmed.

*Abbett, Jr. vs. Georgia-Pacific Corp., Oct. 11, 2012*

Causation; Evidence – Res Judicata

Where the issue of causation for the employee's low back surgery was not litigated during an administrative conference for a rehabilitation request to terminate a rehabilitation plan, the compensation judge did not err by failing to give that decision a res judicata effect in a later hearing on the causation issue.

Permanent Total Disability – Substantial Evidence

Substantial evidence supports the compensation judge's finding the employee was permanently and totally disabled where the employee did not voluntarily retire, he could not return to work without restrictions or perform light duty work, and vocational opinion indicated he could not find suitable employment.

Affirmed.

*Price vs. David Fox, Oct. 15, 2012*

Employment Relationship – Independent Contractor

Where the respondent met all of the safe harbor criteria for a laborer under Minnesota Rules 5224.0110, subp. 2, he is an independent contractor, and the judge's finding of an employment relationship between the respondent and the appellant is reversed.

Reversed.

*Eide vs. Award Constr. Co., Inc., Oct. 16, 2012*

Arising Out Of and In the Course Of – Traveling Employee

Where a traveling employee was "in the course of" his employment at the time of his heart attack, but the only causation evidence in the record indicated that the employee's work activity was not a substantial contributing cause of his death, substantial evidence supports the compensation judge's findings that the employee's heart attack was not causally related to the employee's work activity and did not "arise out of" his employment.

Affirmed.

Arising Out Of and In the Course Of – Going To and From Work

Where the employee's fall occurred while she was crossing a public space and she was not encountering a hazard greater than that encountered by the general public, her injury did not arise out of and in the course of her employment.

Affirmed.

*Holter vs. Kootasca Cmty. Action, Inc., Oct. 22, 2013*

Causation – Substantial Evidence  
Evidence – Expert Medical Opinion

Substantial evidence, including the adequately founded opinion of Dr. Ghose, supports the finding of the compensation judge that the employee sustained a temporary cervical strain/sprain on Dec. 8, 2009, that resolved without the need for further medical care or restrictions by April 23, 2010.

Affirmed.

*Milbrat vs. The Marketplace, Inc., Oct. 22, 2012*

Arising Out Of and In the Course Of – Compensable Consequences

Substantial evidence supported the compensation judge's conclusion that the employee's automobile accident occurred when she was on her way from her doctor's office to obtain prescription medication related to her original work injury, and, under these circumstances, the compensation judge did not err in concluding that the injuries the employee sustained in the automobile accident were a compensable consequence of her work injury.

Affirmed in part and vacated in part.

*Boggs-Rucktaeshel vs. Northwest Airlines Corp., Oct. 24, 2012*

Practice and Procedure – Record

In the absence of an evidentiary record, that is, testimony and/or documentary evidence submitted or specifically identified at a hearing, this court has no way to determine what documents or evidence the compensation judge may or may not have considered in making the decision to dismiss the employee's claim petition.

Practice and Procedure – Dismissal

Based on the procedural history of this case as reflected in the pleadings and the briefs of counsel, the judge's dismissal of the employee's claim petition, which was effectively with prejudice, was not appropriate without a hearing. The dismissal is vacated, and the case is remanded for a hearing on the dismissal.

Vacated and remanded.

## Summaries of Decisions

*Simmonds vs. Roundy's, Oct. 30, 2012*

### Causation – Substantial Evidence

Substantial evidence supports the compensation judge's determination that the employee failed to prove that her work injury was a substantial contributing factor in her claimed medical treatment.

Affirmed.

*Shevchuk vs. Coca-Cola Refreshments USA, Inc., Oct. 31, 2012*

### Causation – Substantial Evidence Gillette Injury – Substantial Evidence

Substantial evidence supported both the compensation judge's conclusion that the employee's specific work injuries substantially contributed to the employee's left knee condition and need for treatment and the judge's denial of the employee's Gillette injury claim.

Affirmed.

*NY vs. E.A. Sween Co., Oct. 31, 2012*

### Causation – Medical Treatment Causation – Substantial Evidence

The issue in superseding, intervening cause cases is not merely whether the intervening injury or condition is itself a substantial contributing cause of the employee's subsequent disability but whether that intervening injury or condition has broken the causal connection between the employee's work injury and that disability. In this case, substantial evidence, including expert medical opinion, supports the compensation judge's finding that the employee's work injury was not a substantial contributing cause of the employee's claimed disability or need for medical treatment after the motor-vehicle accident.

### Causation – Intervening Cause

Where substantial evidence supports the conclusion that the employee's work injury was merely a temporary aggravation of a pre-existing condition, and where the employee was involved a subsequent motor-vehicle accident that resulted in a dramatic increase in the employee's symptoms, along with additional complaints and objective findings, and additional need for treatment not recommended before the motor-vehicle accident, substantial evidence supports the compensation judge's finding that the motor-vehicle accident was a superseding, intervening cause.

Affirmed.

*Watson vs. Wil-Kil Pest Control, Nov. 1, 2012*

### Attorney Fees – Roraff Fees Attorney Fees – Genuine Dispute

Substantial evidence supports the compensation judge's determination that there was no genuine dispute over the employee's need for surgery. The judge's denial of the employee's claim for Roraff fees is accordingly affirmed.

Affirmed.

Causation – Intervening Cause

The compensation judge properly concluded that the aggravation of the employee’s low back condition, resulting from a coughing incident, was not an intervening, superseding cause of the employee’s subsequent disability. The fact that the cough was caused by pneumonia, as opposed to a less serious illness, is irrelevant to the analysis.

Permanent Total Disability – Substantial Evidence

Substantial evidence, including the opinion of the employee’s vocational expert, supported the compensation judge’s finding of permanent total disability.

Affirmed.

Permanent Total Disability – Substantial Evidence

Where there were adequately founded expert medical and vocational opinions indicating that the employee was not able to perform or find suitable gainful employment within his restrictions, substantial evidence supports the compensation judge’s finding that the employee is permanently and totally disabled.

Evidence – Admission

Evidence – Vocational Expert

Where an expert vocational opinion on the employee’s sustained work capability was based on a three-day vocational evaluation of the employee using a combination of work activities, work samples, psychometrics, behavioral observations and other techniques, the compensation judge properly considered the foundational reliability of the testimony and did not err by failing to strictly adhere to the analytical framework of the Frye-Mack test.

Affirmed.

Evidence – Credibility

Where the employer alleged that the employee had made misrepresentations regarding his wages and employment in another legal proceeding, the compensation judge was not required to find, as a matter of law, that the employee’s contrary testimony in the workers’ compensation proceeding was lacking in credibility.

Earning Capacity; Job Search; Temporary Partial Disability

Where the employee had been working two jobs with a unique work schedule before his injury and was physically capable of only working one job after his work injury, substantial evidence supports the compensation judge’s determination that the employee was not required to perform a job search in order to be entitled to temporary partial disability benefits.

## Summaries of Decisions

### Permanent Partial Disability – Substantial Evidence

Where there was a typographical error in the compensation judge's finding of permanent partial disability under Minnesota Rules 5223.0390, which referred to another subpart of that rule, the compensation judge's finding based on that rule is not inconsistent and need not be reversed.

### Practice and Procedure – Adequacy of Findings

The compensation judge's findings are sufficiently adequate for this court's review.

Affirmed.

*Brun, Sr. vs. Red Lake Builders, Dec. 3, 2012*

### Vacation of Award – Substantial Change in Condition

Under these particular circumstances, especially in view of the fact that the employee's ability to work has not changed and medical expenses remain available, the employee did not establish good cause to vacate the award on stipulation, despite his need for additional surgery following the issuance of the award.

Petition to vacate award on stipulation denied.

*Mironenko/Drier vs. Grounded Air, Inc., Dec. 3, 2012*

### Insurance – Coverage

#### Employment Relationship – Joint Employers

#### Statutes Construed – Minnesota Statutes § 176.071

In joint employment cases an employee may look to one or the other or to both employers for compensation. While Minnesota Statutes § 176.071 allows joint employers, as between themselves, to contractually agree which employer will pay the compensation for which they are liable, the statute does not permit a joint employer to contract away its liability for compensation benefits imposed by Minnesota Statutes § 176.021, subd. 1. Where, as here, one party fails to obtain agreed upon workers' compensation insurance coverage, both employers are uninsured, and the Special Compensation Fund is liable for benefits to the injured employee. The compensation judges, therefore, properly held that the SCF was entitled to reimbursement from the uninsured employer, Grounded Air, pursuant to Minnesota Statutes § 176.183.

### Special Compensation Fund

#### Statutes Construed – Minnesota Statutes § 176.183, Subd. 1.

An uninsured employer includes any owner or officer of a corporation who directs and controls the activities of employees. The compensation judges properly held the president and sole owner of Grounded Air personally liable for reimbursement to the SCF where he directly supervised the vice president and office manager of the company.

Affirmed.

## Summaries of Decisions

*Garner vs. Mobile Washer, Dec. 4, 2012*

### Temporary Total Disability – Withdrawal From Labor Market

Where recommended medical treatment and rehabilitation were prevented by the employee's incarceration, incarceration represented a withdrawal from the labor market supporting the discontinuance of temporary total disability benefits.

Reversed.

*Bjorklund vs. Bjorklund Constr., Dec. 5, 2012*

### Temporary Total Disability – Substantial Evidence

Where the employee conducted a limited job search for executive positions that was interrupted by a nonwork-related surgery, the compensation judge did not err by denying temporary total disability benefits during that time period.

Affirmed.

*Johnson vs. USF Holland, Inc., USF Holland, Dec. 5, 2012*

### Causation – Substantial Evidence Evidence Credibility Evidence – Expert Medical Opinion

Substantial evidence, including the credible testimony of the employee and the expert medical opinion of the employee's treating surgeon, supports the compensation judge's determination that the employee sustained a permanent, work-related injury to his low back in June 2009 and that the work injury was a substantial contributing cause of the employee's need for low back treatment, including surgery on Jan. 17, 2012.

Affirmed

*Olsen vs. Mackay/Minn. Envelope, Dec. 12, 2012*

### Vacation of Award – Voidable Award

The employee established good cause to vacate a provision in the settlement agreement closing out future Roraff fees.

Petition to vacate award on stipulation granted in part.

*Johnson vs. A Touch of Class Painting, Inc., Dec. 12, 2012*

### Appeal – Notice of Appeal

The Workers' Compensation Court of Appeals may only review those issues raised in the notice of appeal, Minnesota Statutes § 176.421, subd. 6.

Vacation of Award

The *pro se* appellant failed to establish grounds to vacate an award on stipulation on grounds of mistake, newly discovered evidence, fraud, or a substantial change in condition or for any other reason.

Evidence – Res Judicata

Res judicata applies to preclude an employee from proceeding with claims raised in prior litigation.

Affirmed.

*Lyon vs. Vitran Express, Dec. 13, 2012*

Causation – Permanent Injury

Causation – Temporary Injury

Gillette Injury

Where the employer and insurer conceded that the employee had sustained a work-related injury to her shoulder, and the primary dispute was over whether or not the injury had resolved by the hearing date, it was irrelevant whether the injury was a Gillette or specific injury, case law standards for Gillette injuries were inapplicable, and the judge did not err by failing to make an express finding as to whether the injury was Gillette or specific.

Maximum Medical Improvement – Substantial Evidence

Where the employee had not undergone a recommended EMG by the hearing date, and there was no evidence that the employee delayed the test in order to delay maximum medical improvement (MMI), substantial evidence supported the compensation judge's decision that the employee had not reached MMI.

Wages

Where the employee testified that she had been hired to work 40 hours a week at \$12.50 an hour, and the employer and insurer introduced no opposing testimony on the issue, and the employee only worked for one week, which included an unpaid holiday, prior to her work injury, the judge did not err in concluding that the employee's weekly wage was \$500.00, despite the fact that the employee never earned \$500.00 in any of her three weeks of employment with the employer.

Affirmed.

*Arbach vs. Stevens Cnty. Ambulance Serv., Dec. 18, 2012*

Temporary Partial Disability – Earning Capacity

Substantial evidence supports the compensation judge's determination that the employee's failure to engage in a diligent job search rebutted the presumption that her actual earnings were an accurate measure of her earning capacity and the compensation judge's denial of the employee's claim for temporary partial disability benefits.

Affirmed.

## Summaries of Decisions

*Rodriguez vs. JBS USA, LLC, Dec. 18, 2012*

### Evidence – Expert Medical Opinion

The opinion of the employee's treating surgeon recommending microdiscectomy surgery at the L4 and L5 levels was adequately founded where the doctor examined the employee, obtained a history from the employee and reviewed his medical treatment records including MRI scans. That the doctor had not seen the employee's EMG study prior to recommending surgery does not render his opinion without foundation, but goes to the weight to be afforded the opinion by the compensation judge.

Affirmed.

*Engelhart vs. Liston Gen. Contracting, Dec. 18, 2012*

### Causation – Temporary Injury

Substantial evidence, including the expert medical opinion adopted, supported the compensation judge's finding that any work-related neck injury the employee may have sustained was merely temporary.

Affirmed.

*Van Kirk vs. Kraft American, Dec. 27, 2012*

### Wages – Calculation; Evidence

Pursuant to Minnesota Statutes § 176.411, subd. 1, the compensation judge did not err in relying upon the employer's handwritten 26-week summary of the employee's earnings for the 13 biweekly payroll periods ending Nov. 6, 1993, to determine the employee's pre-injury weekly wage. Where the evidence is insufficient to calculate the daily or weekly wage under Minnesota Statutes § 176.011(8a) or (18), the judge may use another method which reasonably reflects the employee's loss of earning power. The compensation judge did not err in using the 26-week wage summary rather than the employee's Social Security FICA earnings record on the facts in this case.

### Evidence – Estoppel and Laches

Where the employer and insurer voluntarily paid benefits to the employee's dependents, tolling the statute of limitations, where the petitioner withdrew her claim for underpayment of dependency benefits in the proceeding before the compensation judge and where the compensation judge permitted the respondent's claim for an overpayment, the doctrine of laches does not apply to bar the employee's claim of an underpayment.

Affirmed in part and vacated in part.

*May vs. Delta Air Lines, Inc., Dec. 27, 2012*

### Causation – Substantial Evidence

Substantial evidence, in the form of well-founded medical opinions, supports the compensation judge's determination that the employee's humerus fracture arose out of and in the course of employment.

Affirmed.

## Summaries of Decisions

*Vick vs. Northern Engraving Corp., Dec. 28, 2012*

### Evidence – Res Judicata

Where a claim involves eligibility for benefits based on factual circumstances, such as medical restrictions, a prior decision is res judicata only with respect to the period considered in the former hearing.

Affirmed.

*Vanderbeek vs. City of St. Paul, Dec. 31, 2012*

### Evidence – Credibility

Where the employer alleged that the employee had made misrepresentations regarding his wages and employment in another legal proceeding, the compensation judge was not required to find, as a matter of law, that the employee's contrary testimony in the workers' compensation proceeding was lacking in credibility.

### Earning Capacity

#### Job Search

### Temporary Partial Disability

Where the employee had been working two jobs with a unique work schedule before his injury and was physically capable of only working one job after his work injury, substantial evidence supports the compensation judge's determination that the employee was not required to perform a job search in order to be entitled to temporary partial disability benefits.

### Permanent Partial Disability – Substantial Evidence

Where there was a typographical error in the compensation judge's finding of permanent partial disability under Minnesota Rules 5223.0390, which referred to another subpart of that rule, the compensation judge's finding based on that rule is not inconsistent and need not be reversed.

### Practice and Procedure – Adequacy of Findings

The compensation judge's findings are sufficiently adequate for this court's review.

Affirmed.

# Minnesota Supreme Court

*October through December 2012*

Case summaries published are  
those prepared by the WCCA



***Barbara Preston v. Hitchin Rail, Inc., A12-1062, Dec. 26, 2012***

Decision of the Workers' Compensation Court of Appeals filed on June 4, 2012, be, and the same is, affirmed without opinion.

***Sammy L. Yarbrough v. First Student Inc., A12-1226, Dec. 12, 2012***

Decision of the Workers' Compensation Court of Appeals filed on June 19, 2012, be, and the same is, affirmed without opinion.